The inference to the best legal explanation

The Inference to the Best Legal Explanation

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Courts use inferences to the best explanation in many contexts and for a variety of purposes. Yet our understanding of lawyers' uses of this inferential form is insufficient. In this article, after briefly introducing this inferential form, I set out (i) to explain the structure of such arguments by reference to an argument scheme; (ii) to clarify the types of claims courts support by deploying such inferences while attempting to justify acting in accordance with explanatory principles (inferences I shall refer to as IBE-P); (iii) to offer an account of the "explanatory" relationship on which IBE-P is predicated; (iv) to explain what precisely can count as part of the *explanandum* in an IBE-P and, finally (v) discuss criteria that might be used to adjudicate which is the best among rival explanations.

In *Lipkin Gorman (a firm)* v *Karpnale ltd*, Lord Goff of Chieveley deals with the question of whether the defendant has a change of position defence opposable to the plaintiff's action for money had and received.[1] He acknowledges that whether or not

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this defence 'is or should be recognised [in English Law] as a defence to claims in restitution is a subject which has been much debated in the books'.[2] He also claims that there is consensus that the defence should be recognised in English law and vehemently adheres to that consensus[3].

But there is a difficulty, as 'the defence has received at most only partial recognition in English law'[4]. He goes on to identify two groups of cases whose decisions can be said to rest upon a change of position defence:

> (1) where an agent can defeat a claim to restitution on the ground that, before learning of the plaintiff's claim, he has paid the money over to his principal or otherwise altered his position in relation to his principal on the faith of the payment (the "Good Faith Agent" Norm); and (2) certain cases concerned with bills of exchange, in which money paid under forged bills has been held irrecoverable on grounds which may, on one possible view, be rationalised in terms of change of position (the "Forged Bills of Exchange" Norm).[5]

Lord Goff also claims that, in other situations in which change-of-position-type facts arose, 'it has been usual to approach the problem as one of estoppel' but argues that 'in many cases estoppel is not an appropriate concept to deal with the problem.'[6] Estoppel's insufficiency to cover all the relevant cases would betray the need for a general principle, in English Law, allowing a defence of change of position. As Lord Goff puts it '[t]he time for its recognition in this country is, in my

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[1] [1991] 2 AC 548.
[2] ibid 578.
[3] ibid.
[4] ibid at [G].
[5] ibid 578-579.
[6] ibid 579 at [B]-[E].

opinion, long overdue'[7].

In support of his conclusion, Lord Goff enlists a number of different arguments. He uses comparative material as persuasive authority, he draws on scholarly consensus, and he resorts to legal policy considerations. One of these arguments performs a crucial role in legitimizing his decision and, accordingly, commands most of his attention in the opinion, namely, an inference to the best explanation to the effect that the defence of change of position is the best way to make sense of a collection of legal sources and the norms they contain (in particular (a) the two groups of cases mentioned above, (b) some cases that are normally dealt with by reference to estoppel, and (c) Lord Mansfield's (broad) *obiter* statements in *Moses v Macferlan*).[8]

Yet, claiming that Lord Goff used an inference to the best explanation to support his conclusion is not very illuminating, given how little clarity we have about this inferential form, in particular when used by lawyers. Literature on the use of inferences to the best explanation in legal contexts has developed in two fronts: (i) the study of its use in the assessment and/or evaluation of judicial evidence[9] and (ii) the inferences made in support of legal principles[10] (what I will refer to as "IBE-P"). Although some progress has been made in recent years, our understanding of many of IBE-P's fundamental traits remains underdeveloped.

When instances of IBE-Ps appear in judge's opinions, the argument takes

[7] ibid 580 at [B].
[8] ibid, 578-579.
[9] See, *inter alia*, David. A. Schum, 'Species of Abductive Reasoning in Fact Investigation in Law' (2001) 22 CardozoLawRev 1645; MS Pardo and RJ Allen 'Juridical Proof and the Best Explanation' (2008) 27 (3) LawPhilos 223; Amalia Amaya, *The Tapestry of Reason* (Hart Publishing 2015), 503ff.
[10] The literature on the IBE-P (or "legal abduction") is sparse. Progress has been made by *inter alia* Amaya (n 9) 503-525; Scott Brewer, 'Exemplary Reasoning: semantics, pragmatics, and the rational force of legal argument by analogy' (1996) 109 HarvLRev 923 (who discussed legal abduction as an element of his account of legal analogy); Giovanni Tuzet, 'L'abduzione dei Principi' (2009) 33 Ragion Pratica 517.

enthymematic form, as it is common (and often appropriate) in legal argumentation: a legal argument does not normally wear its logical form on their sleeve. The same, of course, can be said about courts' uses of deductive inference. But for someone trying to grasp the logical form of a loosely presented deductive legal argument, help is usually at hand: literature on the most common deductive forms, as well as on formally fallacious putative inferences, is well developed. Nothing similar is available when we analyse arguments that convey IBE-Ps. In what follows, I aim to provide some clarity about its structure and about the primary ways in which courts use it.

In order to do so, I begin by introducing the basic features of the (not specifically legal) inference to the best explanation by contrasting it with other inferential forms. This section is primarily addressed to readers who are not familiar with the canonical inferential forms and, accordingly, readers who are familiar with them should feel free to skip it. In the second section, I start the main job of analysing the IBE-P and I do so by presenting an initial argument scheme. In the third section, I refine the scheme by discussing what kind (or kinds) of conclusion(s) such arguments try to establish. With that in place I move on to present, in the section, an account of "explanation". In the fifth section, I discuss comparative criteria that can help adjudicate between rival explanations.

1. Inference to the Best Explanation 101

The Inference to the Best Explanation (IBE)[11] is one of the fundamental inferential forms, alongside deduction and, arguably, induction.[12] In all inferential forms the

[11] CS Pierce was who first suggested that abduction would be an inferential form irreducible to either deduction or induction, although Pierce's own account of it varied significantly over the decades (as shown by KT Fann, *Pierce's Theory of Abduction* (Martinus Nijhoff 1970).

[12] Some contemporary accounts of induction suggest that it can be justified only if it is conceived as a subclass of IBE, thus reducing the basic inferential forms from three to two. See DM Armstrong,

truth of the premises offers support to the truth of the conclusion, but they vary widely on the kind of support they offer. While a deductive argument is truth-preserving, in that the truth of the premises guarantees the truth of the conclusion, the premises of neither inductive inferences nor IBEs offer that kind of support to their respective conclusions. In other words, in non-deductive inferences the truth of the premises is compatible with the conclusion being false. The matter of what precisely is the support (if any) given by premises on non-deductive inferences is contested. The conclusion is sometimes said to be *probably* true[13] and sometimes it is said to be *truthlike* (i.e. *closer* to the truth)[14]. Also, in relation to IBE, there is the important question of whether the conclusion is likely and/or close to the truth in absolute terms or within a more limited set of comparators.

Be that as it may, in IBE (as well as in induction) the truth of the premises is meant to give some support to the conclusion. The flip-side of IBE not being truth-preserving is the fact that the inference is ampliative, that is to say, the conclusion contains *more* than what is contained in the premises[15]. When Lord Goff infers the existence of a general principle of change of position, his premise(s) pointed to the existence of two more particular kinds of cases in which (it could be argued that) the defence of change of position was admitted. The conclusion is ampler than the premises, in the sense that it adds to the knowledge conveyed in the premises: while the premises tell me of two classes of cases in which the defence should be admitted,

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'What Makes Induction Rational?' (1991) 30 *Dialogue* 503, and Peter Lipton, *Inference to the Best Explanation* (first edition 1991, second edition, Routledge 2004).

[13] Igor Douven, 'Abduction', *The Stanford Encyclopedia of Philosophy* (Summer edn 2017), <https://plato.stanford.edu/archives/sum2017/entries/abduction/> section 2, accessed 15 July 2018.

[14] There are good reasons to believe that the idea of a "proximity to truth" is not analysable in terms of "probability". The notion is interestingly discussed in Theo AF Kuipers, *From Instrumentalism to Constructive Realism* (Kluwer 2000).

[15] It is uncontroversial that IBEs possess this particular feature. See, for instance Douven (n 13) 1; in relation to legal IBE, Amalia (n 10) 505; Giovanni Tuzet, 'Legal Abduction' (2005) 6 Cognitio 265, 274.

the conclusion widens the field of applicability of the defence. In addition, the existence of the general principle does not follow as a matter of logical necessity from the acceptance of a defence of change of position in those two particular classes of cases; but neither are the cases irrelevant for the conclusion Lord Goff reaches. The conclusion is meant to be supported, but not entailed, by the premises.

Another crucial feature shared by IBE and inductive inferences is that they are non-monotonic. A good instance of an IBE might be rendered not as good (or indeed bad) by the addition of further premises. First order logical deductions, by contrast, are monotonic. If an argument is deductively valid (i.e. if from the truth of the premises the truth of the conclusion follows *necessarily*), the relation of logical entailment is not disturbed regardless of whether or not more premises are added to the original set of premises. If all men are mortal and Socrates is a man, it necessarily follows that Socrates is mortal, regardless of whatever additional premise one adds to the set of premises. The same is not true in IBEs. A perfectly good explanation of a set of premises (say premises that describe empirical facts), might be rendered into a bad explanation if we add premises describing other facts that could not be accounted for in the original explanation. That is true of IBEs in general, not only ones about empirical facts. If you imagine a counter-factual situation in which another Law Lord would have raised, against Lord Goff's argument, the (putatively) true claim that there are other cases (i) which would fall squarely within the scope of the suggested principle of change of position and (ii) in which previous courts have declined to apply such principle, it is easy to see that the strength of Lord Goff's argument would have been negatively affected.

In sum: IBEs are non-truth-preserving, ampliative, and non-monotonic.

To conclude this section, I would like to introduce an important distinction

that is sometimes overlooked by both general accounts of IBE and specific accounts of IBE-P. It is important to distinguish between the investigation of IBE as *an inferential form* and the investigation of IBE as a *hypothesis-generating mechanism*. It is common to claim that arguments that could be described as being "inferences to the best explanation" or "abductions" (expressions often used interchangeably) are hypothesis-generating.[16] To claim that an item is hypothesis-generating is to place that item in the context of a given investigation. Presumably, an investigation that has a hypothesis-generating phase would also have a hypothesis-confirmation phase and, hence, would unfold in at least two phases. This is not the same as claiming that IBE is an inferential form, that is to say, a form of argument in which *the premises give support to the claim that the conclusion is true* (or *probably true, or truthlike,* either in absolute terms of relative to a set of rival explanatory theories).[17]

Of course, there might be connections between IBE *qua* an aspect of an investigative process and IBE *qua* an inferential form. Qualifying IBE as hypothesis-generating is not simply to say that a to-be-confirmed claim (a hypothesis) is generated, but it also says something about the quality of that hypothesis, namely, that it is a good enough candidate to trigger the second phase of the investigative procedure. Being good enough in that sense might plausibly turn on whether the hypothesis is more likely to be true than other rival candidates for a hypothesis about the relevant *explananda*, or perhaps on whether it is more truthlike than its rivals. So

[16] A claim that has origins in Pierce's work, but which found clear expression in NR Hanson, 'Is There a Logic of Discovery?' in H Feigl and G Maxwell (eds), *Current Issues in the Philosophy of Science* (Holt, Rinehart, and Winston 1961), 20-35.

[17] This is a claim famously spelled out by Gilbert Harman, 'Inference to the Best Explanation' (1965) 74 (1) PhilosRev 88, 89. The suggestion that there are two kinds of IBE, the weak (simply hypothesis generating) and the strong (which would include some sense of inferential support to one hypothesis over other(s)) relates to these two uses of the inference. See, *inter alia*, I Niiniluoto, 'Defending Abduction' (1999) 66 (supplement) PhilosSci S436. The vocabulary here can be confusing: sometimes the expression "Inference to the Best Explanation" is reserved to the inferential form, thus excluding the hypothesis-generating mechanism. At other times it appears to cover both, as in Amaya (n 10) 505-8. As it will become clear in what follows, my interest here is on IBE as an inferential form.

that IBE is an inferential form might tell an important part of the story about why it is capable of generating good hypotheses, but whether or not it is a good inferential form does not turn on whether or not it is capable of being used in a particular way in a particular investigative method (paradigmatically, the scientific method).

These considerations are not meant to suggest that IBE-P is a species of IBE, as there are very important features to IBE-P that do not fit easily with at least some accounts of IBE. They are just meant to highlight features that both IBE and IBE-P have in common and, thus, to clear the ground for an account of IBE-P's more peculiar features. In the next section, we begin this explanation by providing an account of the inferential structure of IBE-P.

2. An argument scheme for IBE-P

At this stage it will be useful to provide a preliminary account of the argument's basic structure and, in order to do so, I present, in this section, an argument scheme that aims at capturing IBE-P's most salient properties.

An argument scheme for IBE-P must fulfil a number of *desiderata*. At its most basic, an IBE departs from a certain set of items (the *explanandum*) and then asks what the best explanation (*explanans*) for the items is, inferring from (i) the truth of claims about the occurrence of the items and (ii) the explanatory relationship between them and the *explanans,* (iii) the truth of this explanation. Argument schemes that have been put forward in the literature for IBEs all attempt to capture these basic elements with different degrees of success.

When trying to clarify the use of IBE-P by courts, however, such general argument schemes for IBEs should be approached with caution. Many such schemes bear the mark of the ways in which IBE is used in scientific research. Some build the

argument's hypothesis-generating capacity into the conclusion and, as a result, the scheme's conclusion is that a certain explanation "is a plausible hypothesis"[18]; others rely on concepts like 'probability' that seat uncomfortably with the categorical nature of judicial decision[19]; others still seem to imply that the explanatory relation refers to causal regularities[20].

The argument scheme for IBE-P should attempt to capture features (i), (ii), and (iii) in a way that does justice to the specificities of legal argumentation. The most obvious of such specificities is (iv) that the items that constitute both the *explanandum* and the *explanans* are normative sentences. In what follows, I will use the word "rule" to refer to each of the *explananda* and the word 'principle' to refer to the normative sentence that plays the role of the *explanans* in the argument[21]. I cannot emphasize enough that "rule" and "principle" are used here just to facilitate the identification of *explananda* and *explanans*: for my purposes here, *there is no ontological difference between them*. Another specificity, which will be discussed in detail in the next section, is that (v) courts often are creatively ambiguous about the type of conclusion they are arguing for and an argument scheme for IBE-P should be able to explain that ambiguity.

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[18] For instance, Walton's well know scheme for abduction in D Walton, 'Abductive, presumptive and plausible arguments' (2014) 21 Informal Logic 141, 162:
'*F* is a finding or given set of facts.
E is a satisfactory explanation of F.
No alternative explanation E^1 given so far is as satisfactory as *E*.
Therefore, E is plausible, as a hypothesis.'

[19] Like this proposal by Kreuzbauer in HM Kreuzbauer, 'Inference to the Best Explanation in the Legal Universe: two challenges and one opportunity' (2016) 47 Rechtstheorie 333, 336: 'If a set F of [usually sufficiently explained] facts $F_1 \ldots F_n$, and a set E of potential explanations $E_1 \ldots E_n$ are given, the explanation E_b (for $E_b \in E$) explains the facts $F_u \ldots F_w$ (for $\{F_u \ldots F_w\} \subseteq F$) best, the probability P that E_b corresponds with reality is higher than the probability, that any other explanation E_c (for $E_c \in E \backslash E_b$) corresponds with reality'

[20] Lipton called this "The Causal Model" in chapter 3 of Lipton (n 12) 30ff.

[21] Jaap Hage has suggested at a discussion of this paper in Maastricht that retaining a conceptual difference between rules and principles within the scheme might boost its explanatory power, as the principles arrived at are norms that (i) remain one step further removed from the sources and (ii) that would explain them having different properties *vis-à-vis* the source rules. I find this suggestion intriguing but developing it would not be possible within the confines of this paper.

From items (i) through to (v) a picture of the *desiderata* for an argumentative scheme that captures the complex ways in which courts use IBEs emerges. One such scheme should account for how the argument takes a set of rules (the *explanandum*) to be best explained by a certain principle (the *explanans*), inferring from the existence of such rules and from that explanatory relationship between them and the relevant principle, something about that same principle. The following argument scheme spells out each of those elements:

(1) Principle P_1 explains R_1, R_2,…R_n.

(2) No other principle explains each of R_1, R_2,…R_n better than P_1.

(3) **If** P_1 explains R_1, R_2,…R_n,, and no other principle explains each of R_1, R_2,…R_n better than P_1, **then** there is a reason to act according to P_1.

Therefore, from (1), (2), and (3),

(4) There is a reason to act according to P_1.

This argument scheme requires further clarification. First, in relation to premise (3), it is not immediately clear how the explanatory relationship that features in the conditional's antecedent could be a sufficient condition for the normative claim that features in its consequent. As it turns out, there are a number of different, and often concurrent, ways to make this relation plausible, although they each rely on presuppositions that are not free from controversy. The existence of concurrent, albeit controversial ways to make the conditional in (3) plausible is at the root of the apparent hesitation with which courts often lay out the conclusion(s) of the argument. In the next section I discuss different accounts of IBE-P's conclusion and try to show

how each account of the conclusion can make the sufficiency relation expressed in (3) plausible (not without exacting an argumentative price).

Second, some of the terminology used in the scheme is not self-evident, in particular the expressions "explains" (in the first two premises) and "explains…better" (in the second premise). As the support between premises and conclusion is predicated on the existence of an explanatory relationship between the rules contained in the *explanandum* (R_1, R_2,…R_n) and the principle that explains them (P_1), a complete account of IBE-P must elucidate what counts as an explanation (for the purposes of the inferential type). I address the question of what an explanation is for the purposes of IBE-P below, in section 4.

Similarly, as the argument relies on a comparison between the explanatory quality of the explanation favoured (P_1) and the explanatory quality of any other rival explanations, a complete account of IBE-P must shed light on the question of how one explanation (of the kind needed for IBE-Ps) might be better than another. This turns out to be a complex challenge, as there are different grounds for comparison: one explanation might compare positively to another on grounds of coverage of the *explanandum* (when P_1 explains more *explananda* than P_2); alternatively, even if both P_1 and P_2 fully explain partially coincident sets of rules, only the rules belonging to the set explained by P_1 might truly belong together, the set explained by P_2 not being explanatorily homogeneous (ie, the set is either over-inclusive or under-inclusive); or perhaps it is one of the principle's intrinsic properties that makes it superior *qua* explanation (eg principle P_1 might have more moral or legal credence than principle P_2). A complete account of the comparative criteria cannot be given within the confines of this article, but I will shed some light on this comparative aspect of IBE-P's in this article's fifth section.

3. IBE-P's Conclusion and some ways to make Premise (3) Plausible

Recall that the question Lord Goff is addressing in the relevant section of his opinion in *Lipkin Gorman* is whether or not the principle of change of position 'is, or should be, recognised as a defence to claims in restitution'.[22] As we saw above, he reports that the majority scholarly opinion is that 'such a defence should be recognised in English law', and he agrees.[23] He also states that 'the time for its recognition in this country is […] long overdue'.[24] Lord Goff here seems to hesitate between two versions of the conclusion his argument is driving at. Either his conclusion describes an existing principle within the English legal system or else his conclusion is that one such principle *should be* part of the English legal system. The ambivalence is compounded by many factors that can be found in the speech: the use of the verb "to recognise" (which might offer some support to the descriptive nature of the conclusion), as well as the fact that Lord Goff offers, in addition to the IBE, other grounds to the conclusion (in particular comparative law and policy considerations) which cannot easily be interpreted as militating in favour of a conclusion that simply describes an aspect of existing law.

This sort of hesitation between a conclusion which merely unveils a hitherto opaque aspect of established law and a conclusion in favour of introducing a measure of change in the legal system is far from unusual in contexts in which judges argue from a collection of cases to a general principle[25]. As we will see below, this feature

[22] *Lipkin Gorman (a firm) v Karpnale ltd,* n.1, 578 at [F].
[23] ibid.
[24] ibid, 580.
[25] To mention but one other famous example, Lord Denning, in his *obiter* in *Lloyds Bank* v *Bundy*, claims that '[t]here are cases in our books in which the courts will set aside a contract (…) when the parties have not met on equal terms (...). Hitherto those exceptional cases have been treated each as a

of judicial decisions is not itself rhetorically inert; there are good reasons for judges to be ambiguous about the nature of the conclusion they are trying to justify when they deploy IBE-Ps.

It has been suggested in the academic literature that IBE-Ps militate in favour of a claim that a certain "unexpressed"[26] or "implicit"[27] legal norm exists (call it **C1**). Commenting on *Donoghue v Stevenson*, for example, Neil MacCormick wrote that, in his speech, Lord Atkin saw 'the negligence cases as grounded in a principle that was more implicit in them than as yet fully explicated'[28]. Judicial opinions give some extra credence to such claims, as when Lord Goff talks about "recognising" a legal principle or when Lord Atkin writes that 'in English law there must be, *and is,* some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances.'[29].

An advantage of conceiving courts' use of IBE-P as support for a conclusion about the existence of an implicit legal principle is that it makes it easier to see why courts might be allowed (perhaps even required) to apply to the case at hand a principle that has been mined from a plurality of cases. Courts are primarily law-applying political institutions and there is nothing remarkable about them applying the legal norms they can identify in legal sources to the cases put to them.

So, one way in which the conditional in premise (3) can be made plausible is to take the explanatory relation as evidencing the existence of an implicit legal

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separate category in itself. But I think the time has come when we should seek to find a principle to unite them.' (*Lloyds Bank v Bundy* [1974] 3 A11 ER 757, 763).

[26] See *inter alia* Neil MacCormick, 'Donoghue v. Stevenson and Legal Reasoning' in PT Burns and SJ Lyons (eds), *Donoghue v. Stevenson and the Modern Law of Negligence Proceeding of the Paisleu Conference on the Law of Negligence* (University of British Columbia 1991) 191; Scott Brewer's 'Analogy Warranting Rule' (n 10) 570; R. Guastini *L'interpretazione dei documenti normative* (Dott. A. Giuffre Editore 2004) 209; G. Tuzet gives a helpful overview of the Italian literature at (n 10) above, 525-532.

[27] MacCormick (n 26) 201.

[28] ibid, 202.

[29] *Donoghue* v *Stevenson* [1932] AC 562, 582 (italics added).

principle which, if combined with a plausible claim about courts having a reason to decide according to the law, would yield a conclusion about courts having a reason to apply P_1 to the instant case.

But the claim that courts can infer implicit legal principles from collections of cases has been resisted. There is a worry that the inference simply would not run if its conclusion were an unexpressed, but nevertheless *authoritative*, 'legal principle'. Alexander and Sherwin, for instance, claim that whatever principle might be generated by legal abduction (i.e. IBE-P) 'should not be treated as authoritative' and (presumably) legal.[30] According to the objection, a crucial aspect of what makes something a *legal norm* is its authority, and as the explanatory relationship between rules and principle is unable to convey authority from the former to the latter, it follows that whatever principle might explain the relevant rules cannot be considered authoritative and, by implication, legal.

We must be careful here not to wade unnecessarily into the murky waters of legal ontology and thus fall into the temptation of settling the vexed question of what conditions must be met by a normative standard in order for it to qualify as "legal" as a preamble to providing an account of the IBE-P in law. In fact, there are clear senses in which the inferred principle in an IBE-P is *legal* regardless of the answer one might give to the ontological question. In the first place, the principle is put forward as an explanation for a series of legal materials (not of moral intuitions, physical facts, a canonical religious text, or a musical score). Secondly, courts deploy such arguments when they try to work out how do decide cases put to them in a way that *takes into account* the law and, in fact, some instances of IBE-P are regarded as particularly

[30] L Alexander and E Sherwin, 'Judges as Rule-Makers', in DE Edlin (ed), *Common Law Theory* (Cambridge University Press 2007) 27, 48.

inspired instances of legal argumentation. So, in order to avoid the ontological problem, one might try and come up with alternatives to conceiving the conclusion of IBE-Ps as a claim about the pertinence of a particular normative principle, not explicitly formulated in the legal sources, to a particular legal system (i.e. a claim about what the law is).

One such alternative is to conceive the conclusion of an IBE-P as a claim that courts have a (*pro tanto*) moral reason to act in accordance with a certain principle, regardless of whether or not it belongs to the legal system (call it **C2**). This conclusion matches directly the conclusion in the scheme put forward in the previous section. One could also say that, perhaps in addition to the latter claim, courts use IBE-P in order to ground claims that there is a (*pro tanto*) reason to act in such way as to introduce a certain principle in the legal system, a reason that might be further specified (in legal systems that accept a version of *stare decisis*), into a reason for the court to generate precedents that affirm such principle (call it **C3**). Both C2 and C3 are normative claims, the former regarding how the court should decide a certain class of cases (those which follow under P_1), the latter regarding whether (and how) there is reason to change the legal system so as to introduce P_1. If the conclusion of a court's IBE-P were indeed a normative claim, one would have to rely on some sort of normative justification for premise (3), that is to say, for the sufficiency relationship between the antecedent (the claim that P_1 is an explanation and that it is better than any other explanation) and the consequent (there being a reason to act in a particular way). There are a number of substantive claims that might be able to support such connection, the best known being the conception of public morality that defends the

value of coherence in judicial reasoning[31]. In fact, coherence has often also been offered as a justification for the existence of implicit legal principles[32]. However, regardless of its usefulness to settle the metaphysical question about what kinds of normative standards are properly called "legal", coherence could still be able to justify the existence of a reason for the court to decide in a particular way. A defence of (3) could run along the following lines: if acting coherently is valuable and if the existence of a unifying principle that connects the rules explanatorily is a reason to believe that the actions required by such rules are coherent, then there is a reason to act as required by the unifying principle. Coherence is, of course, not the only possible normative justification for (3). Other substantive justifications such as the value of predictability might also be able to offer a grounding to (3), at least under certain circumstances. Be that as it may, the normative conclusions C2 and C3 rely on the existence of a normative underpinning for premise (3) in our scheme. That is not an insignificant price to be paid for the plausibility of premise (3), as the ongoing disagreement about the value of coherence demonstrates.

So whether IBE-P's normative conclusion is best conceived as being mediated by a descriptive claim about the existence of a legal principle (like C1) or not (like in C2 and C3) the argument's soundness would be predicated on demanding and controversial background assumptions, respectively on legal metaphysics and on normative ethics. Here lies the rhetorical value of a court's apparent hesitation between making descriptive claims like C1 and making normative claims like C2 and

[31] The literature on the value of coherence in legal reasoning is vast and no footnote would do justice to its breath and depth, it ranges from legal theory classics (e.g. Ronald Dworkin's *Taking Rights Seriously* (Duckworth 1977) 31-35 and Neil MacCormick's *Legal Reasoning and Legal Theory* (OUP 1978) 39, 106-108) to contemporary comprehensive defenses of coherence in legal theory (in particular Amaya (n 9) above). There are well known objections to the claim that coherence has value in legal decision-making, as those leveled by Joseph Raz in J Raz, 'The Relevance of Coherence' in Joseph Raz, *Ethics in the Public Domain* (Clarendon Paperbacks 1994) 277-325.

[32] Neil MacCormick, for instance, relates coherence with implicit legal principles in his discussion of *Donoghue* v *Stevenson* in MacCormick (n 26) 17.

C3. By not foreclosing one route to the conclusion, they widen the scope of acceptability of their IBE-Ps, which would be seen as sound both by those who believe in the legality of (implicit) legal principles that explain a given set of legal norms and by those who subscribe to a determined set of substantive normative positions. So, in using IBE-Ps courts might be offering *different* arguments, each of which might lead to a justification for deciding the instant case on the basis of the principle inferred. There is no reason *relating to its inferential form* why an IBE-P would not be able to support each of those routes towards the conclusion, given different sets of assumptions.

It is worth noticing that those different routes are closely related. Thus, as we have seen, adding to C1 the very plausible claim that courts have a reason to apply the law, C2 obtains. Similarly, as we saw above, if one adds to a reason to introduce a certain principle in the legal system (C3) the claim that the court can introduce principles by deciding according to them (as it might happen in systems that accept a version of *stare decisis*), C2 would also follow. In other words, when courts display hesitation between reaching normative or descriptive conclusions in their deployment of IBE-Ps, they can be understood as arguing in the alternative for C2. That is one of the reasons why C2 features as the conclusion of the argument scheme presented in the previous section. It is also worth noticing that the strength of the reason that features in the argument's conclusion is sensitive both to the strength of the explanatory relationship in premise (1) and the strength of the comparison in premise (2)[33].

Having considered the nature of the conclusion of an IBE-P, it is now necessary to turn my attention to the premises that purport to justify such conclusion.

[33] I am grateful to the OJLS reviewer who brought this point to my attention.

In the next section I address the questions about the explanatory relationship, raised by the first premise featured in the argument scheme, while in the fifth section I consider the comparison between explanations which features in premise (2).

4. Explanation in IBE-P

In the literature on IBE the *explananda* are often referred to as "facts". Thus in crime novels, the inference that explains whodunit runs from a number of fictional facts sprinkled along the text. Similarly, in scientific research the *explananda* are often presented as observed facts. Not surprisingly, in some of the literature about legal uses of IBE, there is talk about the inference running from premises about facts[34]. Although this is perfectly acceptable in a general account of IBE, the category of "facts" might well prove to be over-inclusive when one focuses on more specific uses of IBE. Specific features of a subcategory of "facts" might have an impact on what counts as an explanation of those facts (ie accounts of "explanation" are sensitive to the particular class of facts that are being explained).

As we have seen above, the particular facts that constitute the *explananda* in IBE-Ps are legal rules or fragments of legal rules. In *Lipkin Gorman*, Lord Goff identifies two specific legal rules which he believes can be explained by the principle of change of position, namely, (1) that an agent can defeat a claim to restitution on the ground that, before learning of the plaintiff's claim, he has paid the money over to his principal or otherwise altered his position in relation to his principal on the faith of the payment (the Good Faith Agent rule); and (2) that if money is paid under forged bills of exchange, in addition to other conditions (not fully specified by Lord Goff), then

[34] eg HM Kreuzbauer (n 19) 336-337.

the money is irrecoverable (the Forged Bills of Exchange rule).[35] In spite of the relatively convoluted formulations, each of those legal rules describes a situation under which money cannot be recovered on grounds of restitution.

If we accept that the *explananda* in an IBE-P are legal rules, the question invites itself as to which kinds of explanation can be given of legal norms. A few candidates immediately spring to mind. In the first place, legal norms can be explained genealogically. We might be able to trace the social and/or legal historical facts that causally contributed for the particular legal norm to be considered by courts as part of the particular legal system. Among the many causes that contributed to the acceptance by courts of the "Forged Bills of Exchange" rule is the perceived division of labour and responsibilities in banking practice between bankers and clients in the late 1700's in England (when *Price v. Neil*[36], the most remote site of recognition of the norm in English case law, was decided). However, this sort of causal explanation is not promising as it makes premise (3) in our scheme at least *prima facie* implausible. In the first place, causes are not principles and it is not clear how one could have a reason to act "according to" the facts that caused a legal rule into existence. Secondly, and more importantly, knowledge of how a certain legal rule was caused into being does not, in itself, provide a reason for action. So this is not the sense of explanation we need to make sense of an IBE-P (although a qualified sense of the genealogical explanation might be able to do it, as we will see towards the end of this section).

Another, more promising, way of explaining a legal rule is to specify what makes it a norm belonging to the relevant legal system. In relation to the Forged Bills

[35] See (n 5).
[36] *Price* v *Neil* [1762] 97 E.R. 871.

of Exchange rule, one might point to an authoritative case whose *ratio decidendi* is the rule being explained (say, *Price v. Neil*) and, in a legal system that embraces the doctrine of *state decisis*, that would be a sufficient explanation of what makes the rule in question legal. This kind of explanation might be useful in many contexts and, indeed, appeal to legal sources in order to ground claims that certain norms belonging to the legal system is the bread and butter of legal argumentation. Nevertheless, this is also not the kind of explanation that we need in order to provide an account of IBE-P. This sort of explanation points to the authoritative source that makes the rule legal, but does not specify a principle that would make premise (3) plausible.

The explanation that might make premise (3) plausible is part of the answer to the question: "what reason, other than the source rules' legality, might one have for acting as required by them?" The answer to this question is a *justification* for acting in the way required by the source rules and, hence, the principle that features in IBE-P's conclusion is part of that justification. Accordingly, an account of IBE-P should shed light on that justificatory relationship between what the source rules require and the explanatory principle. That relationship is one in which the principle provides a reason to act as required by the source rule. In other words, the principle would be a sufficient reason for there being a reason to act as required by the rule, something that can be expressed in conditional form as:

If P_1, then there is a reason to act as required by R_1, R_2,…R_n.

As the conditional form makes manifest, the relevant justificatory relation presupposes neither that the explanatory principle is true nor that the principle is a necessary condition for there being a reason to act as required by the source rules. In that sense, the justification required by IBE-P is merely conjectural: the argument

would run regardless of whether either the antecedent or the consequent of the conditional is true. In fact, the argument would run even if *both* antecedent and consequent were false.

In addition, the justificatory relationship required by IBE-P is weak, in the sense that all that is required is that P_1 provides a *pro tanto* reason for acting according to the source rules. It might turn out that there are other reasons that would successfully countervail the reason grounded on P_1 and it might even be that such countervailing reasons necessarily obtain. Furthermore, affirming the justificatory relationship does not commit one to accept that the source rules should be part of the legal system.

Notice that this catholic conception of explanation allows for multiple rival explanations. That is to be expected in an account of the inference to the *best* explanation. In the next section of the paper we address the *comparative* challenge of how to compare the quality of rival explanations.

This account of the explanatory relationship allows us to refine our initial scheme for the IBE-P.

(1) If there were a principle P_1, then there would be a reason to act as required by $R_1, R_2,...R_n$.

(2) No other principle is better than P_1 at providing a reason to act as required by each $R_1, R_2,...R_n$.

(3) **If** (if there were a principle P_1, then there would be a reason to act as required by $R_1, R_2,...R_n$), **and** no other principle is better than P_1 at providing a reason to act as required by each $R_1, R_2,...R_n$, **then** there is a reason to act according to P_1.

Therefore, from (1), (2), and (3),

(4) There is a reason to act according to P_1.

But this is all too abstract. It might help to go back to *Lipkin Gorman*. As we saw above, Lord Goff identifies two rules at the outset of his argument, the Good Faith Agent rule and the Forged Bills of Exchange rule. The explanation that his argument relies on is an answer to the question: why would one have a reason to deny recovery of money had and received when, respectively, (i) an agent has paid the money over to his principal on the faith of the payment and (ii) when money is paid under forged bills of exchange presented by the defendant in good faith. In addition, the answer sought must comply with the proviso that the legal rules should not feature in the explanatory justification. The question of whether those are good rules to have in the legal system in the first place is bracketed out.

The answer Lord Goff gives is the principle of Change of Position, which roughly states that it is inequitable for the plaintiff to require restitution if said restitution would 'leave the defendant in a worse position than the position he would have occupied if he had never received the enrichment' provided the defendant acts in good faith.[37] If this principle is true, there would be a reason to comply with both the Good Faith Agent rule and the Forged Bills of Exchange rule and this is how the principle of Change of Position can be said to explain the source rules. The principle explains why each of the two sets of facts picked up by each rule would be a reason to deny restitution. We can present this argument in the shape of our revised argumentative scheme:

[37] In Paul Key's formulation, at Paul Key, 'Change of Position' (2011) 58 (4) MLR 505, 506-507.

(1) If there were a Principle of Change of Position, then there would be a reason to act as required by the Good Faith Agent rule and by the Forged Bills of Exchange rule.

(2) No principle other than the principle of Change of Position is better at providing a reason to act as required by each the Good Faith Agent rule and by the Forged Bills of Exchange rule

(3) **If** (If there were a Principle of Change of Position, then there would be a reason to act as required by the Good Faith Agent rule and by the Forged Bills of Exchange rule) **and** (No principle other than the principle of Change of Position is better at providing a reason to act as required by each the Good Faith Agent rule and by the Forged Bills of Exchange rule), **then** there is a reason to act according to the principle of Change of Position.

Therefore, from (1), (2), and (3),

(4) There is a reason to act according to the principle of Change of Position.

Before we leave this topic, two further points about of the justificatory relation in IBE-P deserve mention. First, it is possible to give a genealogical reading to that relation, as a way to track the normative considerations that the actual norm producers had in mind, in one way or another, while positing the particular legal authority (eg the normative considerations that influenced the judges who decided *Price* v *Neil* to introduce the Forged Bills of Exchange rule)[38]. It is not clear whether one such reading would be sufficient to render premise (3) plausible, but the idea should not be dismissed out of hand. A sufficiently complex conception of how the mind works,

[38] I am thankful to one of OJLS's anonymous reviewers for bringing this point to my attention.

combined with the value of being faithful to the intention of lawmakers might just do the trick. But this genealogical reading is far from he only possible way in which the justificatory relationship might have reason-generating potential. The justificatory relation explains how the decision the argument is driving at is *coherent* with previously settled legal rules and that, arguably, is a reason to act that is partially insulated from the justificatory capacity of P_1. Regrettably, a full analysis of how the justificatory relation might make premise (3) plausible goes well beyond the scope of what can be accomplished in this article. Such analysis would be crucial for a complete account of the *value* of IBE-Ps, but my main concern here is not to provide one such account.

Second, the justificatory relation in IBE-Ps, as mentioned above, is often programmatic. The credence of a specific principle from which springs the reason to act according to what is required by the source rule might be either predicated on, or enhanced by, embedding the principle into a normative programme which includes other norms and/or factual assumptions. In simpler cases, the principle itself might have sufficient credence to work as a justification and embedding it into a normative programme would not add much to it. In a hypothetical case in which the source rules are "thou shall not kill men" and that "thou shall not kill women", the principle that "thou shall not kill humans" cannot be deductively derived from it (as there are instances of humans who are neither men nor women), but such principle is a sufficient justification of our hypothetical source rules. That will not always be the case, though.

The programmatic aspect of IBE-P justifications is apparent in *Lipkin Gorman*, as the principle of Change of Position's justificatory potential is predicated on the existence of other rules in the legal system, in particular the rules about the

restitution of unjustified enrichment. After all, Change of Position is *a defence* in a lawsuit grounded on the principle that one has to pay back what was unjustly received and, as such, it is a part of a wider normative programme that also contains other rules (and perhaps also factual assumptions) that provide the background against which the defence is meaningful. Change of Position's credence is predicated on this normative programme. As we saw above, this plausibility does not imply accepting this normative programme as ultimately warranted. One might accept the justificatory plausibility of the programme, while still believing the law of unjustified enrichment to be a mistake and that legal systems should be reorganized in such way that, say, title was only bestowed upon someone in the situations which would not give margin to unjustified enrichment (thus making the whole edifice of unjustified enrichment redundant, at great cost to bona fide third parties who trusted the appearance of title).

With this justificatory account of the explanation in place, and given that, as we saw above, it allows for multiple rival explanations, we should now consider the question of what makes one explanation better than another.

5. The Best Explanation

We saw in the previous section a second way in which IBE-P might fail: the putative explanatory principle might turn out not to be a good explanation of the source norms and, consequently, premise (1) in the argumentative scheme would be false. In the present section I want to consider another way in which the argument might fail. Premise (2) or our revised scheme makes it part of the inference that "No other principle is better than P_1 at providing a reason to act as required by each R_1,

$R_2,\ldots R_n$." This premise captures the comparative character of IBE-P[39]. After all, the inference does not rely simply on the existence of *an explanation,* which are legion, but on the *best explanation*, which is only one. Of course, premise (2) does not need to be proven by further argument every time IBE-P is deployed, but whoever uses this inferential form is committed to P_1 being the best explanation to each of the *explananda*.

What precisely makes an explanation better than another is, however, not a simple question.[40] In particular, it is not clear what criteria for best explanation would be useful in the context of IBE-P. As we saw above, IBE-P is predicated on the conditional premise (3), which connects the existence of a best explanation in the antecedent, with a normative consequent to the effect that there is a reason to act according to the principle that best explains the source rules. That means that the reasons that make an explanation comparatively better must be part of a story about the plausibility of (3). This requirement should be kept in mind when considering the suitability for an account of IBE-P of properties identified in the literature about IBE as promising grounds for explanatory comparison.

Take the three properties that have generated most discussion in the general literature on IBE: simplicity, 'analogy' (as defined by Thagard[41]), and consilience.[42]

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[39] The comparative element is so relevant that some accounts of IBE suggest that the inference should be analysed into two stages, an explanation-generating stage and an explanation-selection stage. See P. Lipton (n 12) 148-151; in legal reasoning the point is made by Amalia Amaya at Amaya (n 9) 504-506.
[40] In the literature that discusses scientific uses of IBE comparison might be made in relation to how much the available evidence supports the explanation (the explanation's 'likeliness'), how much insight it brings (its 'loveliness'), or sometimes a combination of both. See Lipton (n 12) 59-62.
[41] P Thagard, 'The best explanation: criteria for theory choice' (1978) 75 (2) JPhilos 76, 91. Thagard is not entirely clear in relation to what he means by analogy, starting from a more traditional conception of analogy as a form of property transfer between the analogues but quickly moving to an epistemic account of analogy in which its main gain is that it facilitates understanding. As he put it, "other things being equal the explanations afforded by a theory are better explanations if the theory is familiar, that is, introduces mechanisms, entities, or concepts that are used in established explanations" (ibid, 91). For him, analogy makes an explanation better because it makes the explanation familiar and, as a result, more easily graspable.
[42] For a discussion of all three see ibid, *passim*.

In relation to the first two, the fact that an explanatory principle is simpler or more analogous might add to the heuristic value of the explanation but, in themselves, they would offer no reason to think that explanatory principle superior to others. For those properties to become relevant in relation to (3)'s plausibility more is needed. One way to see that relevance is to postulate that predictability is a sufficient ground for (3) and that either simplicity and/or analogy would help enhance predictability in certain factual scenarios.

Consilience, by contrast, is a property of normative explanations that, used as a ground for comparison between explanatory principles, would more directly affect the plausibility of the conditional in (3) if we accept the value of acting coherently[43]. Consilience relates to the greater of lesser explanatory coverage that an explanation might have in relation to a given *explanandum*. In what follows, I shall try to motivate the claim above by providing an account of normative consilience and of the preliminary problem of what makes a given rule a part of an *explanandum*. As I will try to demonstrate, consilience is a property that the *best* explanation necessarily has and, as such, helps to rule out other explanations. Consilience, however, is not sufficient. Other grounds for comparison between explanations might have to (and often are) relied upon, in particular the comparative quality of the candidate normative explanations in relation to external benchmarks (such as an assessment of their relative moral merit or demerit in each of them), for better or worse. But before getting to that point, the candidate explanations' consilience must be settled and in

[43] Amalia Amaya suggests that coherence as the master criterion for adjudicating between legal explanations at Amaya (n 9) 511. The claim that coherence makes for a better explanation has been made outwith the legal context by G Harman, 'Reasoning and Explanatory Coherence' (1980) 17/2 AmPhilosQ 151, and others. In fact, the three specific criteria mentioned by Thagard (n 39) above, might be seen as an attempt to unpack the idea of explanatory coherence put forward (vaguely) by Gilbert Harman in his *Thought* (Princeton University Press 1973) 159.

order to understand that, as mentioned above, one has to investigate how the explanatory principle can be said to cover the *explanandum*.

In order to understand the different ways in which an explanatory principle can relate to an *explanandum* it is necessary to have clarity about what makes a particular rule a member of an *explanandum* (for the purposes of an IBE-P). A set of legal rules does not necessarily constitute an *explanandum*. The inference is predicated on the fact that the relevant rules 'belong together', that they invite a common explanation. Things are made complicated by the fact that it is not sufficient for a group of rules to "belong together" that each item shares the property of "belonging to the legal system". Arguably, pertinence to a given legal system is not even a necessary condition for a rule to feature in the *explanandum*, as the growing use of comparative material by courts and lawyers seems to demonstrate.

In practice, IBE-Ps often proceed on the basis of an acceptance by the relevant argumentative players that the rules requiring common explanation do indeed belong together and such agreements are reached by reference to shared properties such as "being located in the same section of a legislative document" (say a Civil Code), or "being a part of the same common law doctrine", or "belonging to the same sub-area of law". Those properties (and others similar in flavour) are often sufficient for lawyers to agree that certain norms should be included in the *explanandum*, but that hardly settles the question. For explanatory homogeneity is not equivalent to being topologically close in legislation, or belonging to the same common law doctrine, or being traditionally placed within the same sub-area of law. Each such properties works well as a practical roadmap for the identification of *explananda* because they relate somewhat reliably (albeit contingently) to another shared property, one that is necessary in order for an IBE-P to run.

We must here proceed with caution. One candidate for a shared property is something along the lines of "being explained by principle P_x". This property would obviously make "belonging together" explanatorily relevant for the purposes of an IBE-P, but it overshoots the target. The problem here is that being explained by a certain principle is not a sufficient condition for explanatory homogeneity. It is perfectly possible that two legal rules be explainable by a given principle and yet that they are not explanatorily homogeneous in the sense that an IBE-P requires.

In order to explain the relation between rules that is necessary for an IBE-P, allow me to return to *Lipkin Gorman* briefly. Recall that the two source rules used by Lord Goff were the "Good Faith Agent" rule and the "Forged Bills of Exchange" rule. Each of these rules offers an answer to a different normative question. The Good Faith Agent rule offers an answer to the following question:

> (Q_1): Is a defence against a claim grounded on restitution available to an agent who, in good faith, received a mistaken payment made by a third party and passed it on to his principal?

Similarly, the Forged Bills of Exchange rule offers an answer to the question:

> (Q_2): Is a defence against a claim grounded on restitution available to someone who, in good faith, received money from the putative issuer of a forged bill of exchange (upon presentation of said bill of exchange) if the defendant had previously (and also in good faith), paid money to a third party for said bill of exchange?

Each rule offers an answer to a different normative question. But the difference should not be overstated. There is a sense in which the two questions should be

considered to be *the same*[44]. That would happen if (Q_1) and (Q_2) are sub-questions of a more general question, whose answer implies a uniform answer to both (Q_1) and (Q_2). One reasonable candidate to a more general question could be:

> (Q_3) Is a defence against a claim grounded on restitution available to a businessperson whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution?

The reason why (Q_3) is a more general question with regard to (Q_1) and (Q_2) is that an answer to (Q_3) would imply (in Lord Goff's opinion) a uniform answer to (Q_1) and (Q_2). The answer to (Q_3) would be a norm that entails both the Good Faith Agent rule and the Forged Bills of Exchange rule. This is the sense in which the two source rules picked out by Lord Goff could be considered the same: the general normative questions that they answer are sub-questions of a more general normative question, whose answer implies a uniform answer to the questions corresponding to the source rules. Affirming that two rules are explanatorily homogeneous is to affirm that they are the same in this particular respect.

Notice that one might sensibly hold a belief that there is a more general normative question of which source questions are sub-questions even in the absence of a formulation of such comprehensive question. In fact, when presented with a conclusive objection to a certain formulation of the comprehensive question, one might be inclined to give up on a formulation while still holding on to the claim that there is one such comprehensive question. Consider the following objection to (Q_3): the formulation is underinclusive as it unduly restricts the normative rationale of (Q_1) and (Q_2) to businesspeople. It is true that in the particular cases that prompted the

[44] Luis Duarte d'Almeida and I have explained this idea in more detail in L Duarte d'Almeida and C Michelon, 'The Structure of Arguments by Analogy in Law' (2017) 31 (2) Argumentation 377.

formulation of the Good Faith Agent rule and the Forged Bills of Exchange rule the defendants were indeed businesspeople but whatever answer is to be given to (Q_1) and (Q_2), one might think, should also apply to private individuals who do not fall under the category of businesspeople. Faced with such objection, it would not be unnatural to retain the sense that there is a similarity between (Q_1) and (Q_2), and try to provide a better formulation of the comprehensive question, perhaps along the lines of:

> (Q_4) Is a defence against a claim grounded on restitution available to someone whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution?

The principle of Change of Position, as formulated by Lord Goff, offers an answer to question (Q_4).[45] But it is important to notice that Lord Goff does not seem to be particularly confident of his own formulation. As it often happens in judicial decisions that infer principles, Lord Goff believes that his formulation of the principle leaves room for further refining by future courts. He states that '[i]t is not however appropriate in the present case to attempt to identify all those actions in restitution to which change of position may be a defence'[46] and that

> [a]t present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full.[47]

Lord Goff's opinion of his own formulation exemplifies a situation in which one might be more confident that the source questions should receive a uniform answer

[45] [1991] 2 AC 548, 586 at [E].
[46] ibid, 586 at [D].
[47] ibid, 586 at [E].

(i.e. that they raise the same normative issues) than one is about the normative issue that has been singled out.

Thus an *explanandum* comprises source rules whose corresponding general normative questions are sub-questions of a more general comprehensive question. This way of understanding the *explanandum* helps comprehend why a principle can only count as a candidate for the best explanation of a set of rules if it is the best explanation of *each* of the rules contained in the *explanandum*. This requirement rules out as best explanations all principles that could explain each of the source rules, but which would not be the *best* explanation of at least one of them. So it is not enough for the inference to run that the explanatory principle is the best *common* explanation to the source rules. For the inference to run, it must be the case that the relevant normative point each of the source rules is trying to resolve is, in the sense explained above, the same. In the argument scheme (and in the revised argument scheme) this requirement is conveyed in premise (2).

With that in place, we can now return to the comparative criteria. In a complex *explanandum*, constituted by many source rules, different rule subsets might be explained by rival principles. In the simplest case of rival explanatory principles, where a principle P_1 provides an explanation for all the *explananda* accounted for by another principle P_2 while, in addition, also providing an explanation for parts of the *explanandum* that are not explained by P_2, P_1 would clearly provide a better coverage of the *explanandum* than P_2. If we accept that one valuable feature of an explanation is 'how much a theory explains'[48] (ie its consilience) and that "one theory is more

[48] Thagard (n 39) 79.

consilient than another if it explains more classes of facts than the other does"[49] it is easy to conclude that P_1 will be a better explanatory principle than P_2.

Things are more complicated when two or more principles are plausible candidates for being the best explanation of all the source rules. Dialectically, a typical way to attack the credence of one putative explanatory principle *vis-à-vis* a rival candidate explanatory principle is to argue that there are other legal rules, not considered hitherto, that belong together with the source rules, thus expanding the *explanandum*. This relates to IBE's non-monotonicity: an IBE-P might be vulnerable to the addition of a new premise either to the effect that the putative principle is not explanatory in relation to a rule (R_x) not included in original inference argument, or to the effect that a principle different from P_1 is better at providing a reason for R_x. If the new rule "belongs together" with the source rules of the original inference, the inference would not run. It is interesting to notice, however, that it is not uncommon that conflicting rules (and sometimes the corresponding cases) are brushed aside by the courts. Lord Goff, for instance, recognizes, in passing that there are cases which are inconsistent with the existence of a general defence of Change of Position in English law.[50]

There is more than one way in which normative consilience might be relevant in relation to the plausibility of the conditional in (3). First, and more obviously, normative consilience confirms the existence of coherence between the source legal rules: they are all justifiable by the principle, which answers their common normative question. If courts were to act according to the principle in the future, their actions

[49] ibid, 91.
[50] See (n 1) 579, where he affirms that: 'There has however been no general recognition of any defence of change of position as such; indeed any such defence is inconsistent with the decisions of the Exchequer Division in *Durrant v. Ecclesiastical Commissioners for England and Wales* (1880) B 6 Q.B.D. 234, and of the Court of Appeal in *Baylis v. Bishop of London* [1913] 1 Ch. 127.'

would also cohere with the *explanandum*. As a result, all that is needed to make (3) plausible is to accept that courts have a reason to act coherently with past court decisions. The more consilient an explanatory principle is, the stronger would the coherence be between the future decision and the actions that are required by the rules contained in the *explanandum*.

But coherence is only one of the ways in which consilience might make (3) plausible. If one supposes that courts have a reason to act in such a way as to abide by legitimate expectations by the social group (however defined) and that the social group expects courts to act in line with past judicial decisions, consilience might also make (3) plausible (even if coherence were not itself valuable).

Consilience does not rule out the possibility that two rival explanations might cover the same *explanandum*. If that were all there was to the comparative aspect of the argument, no tragedy would follow, but the argument would not run, as premise (3) in our scheme would not be true of either of the rival (but equally consilient) explanatory principles.

That might not be the end of the story, however. If consilience helps to track coherence, perhaps there are other ways in which coherence might influence the choice of best explanation. It has been argued, for instance, that coherence between the explanation and our background beliefs might also play a relevant role in selecting the best explanation. Perhaps this integration relates to substantive *normative* background beliefs. Perhaps, as we saw above, a comparison between competing could be settled in ways that go beyond coherence, as we suggested above when considering the possibility of a direct moral evaluation of the relative merits of each explanation. Consilience does not exhaust the ways to compare the type of explanations that are relevant in IBE-Ps, and a complete picture of such criteria

cannot be provided here. However that might be, as we have seen above, the criteria for selecting the best explanation must be integrated in a story about what makes the conditional in (3) plausible.

6. A picture of IBE-P

Courts use precedents in a variety of ways[51]. They apply the *ratio decidendi* of previous cases, distinguish cases, argue by analogy, argue *a fortiori*, and more. Sometimes they argue that there is reason to act in accordance with a principle that is not itself part of the *ratio decidendi* of a previous case and do so by reference to a set of established legal rules. Lord Goff did so in *Lipkin Gorman*, Lord Atkin in *Donoghue*, Lord Denning tried to do so in *Bundy*. When they do so, courts are often cagey about what exactly they are doing: are they inferring the existence of a legal norm (the explanatory principle), or perhaps just inferring that there are reasons to act according to that principle even if it does not qualify as a legal norm? They are also not very clear about what the relationship is between the source rules and the principle they believe should be used to guide action. Not surprisingly, they are not clear about the strength of their argument. In this paper I argued that these inferences take a distinctive form, the inference to the best explanation towards a (legal) principle (IBE-P), which possesses similarities to (but not merely a species of) what philosophers of science call an inference to the best explanation and tried to explain its form, its typical conclusion, the explanatory relationship needed for the argument

[51] The immediate puzzle addressed in this article was raised by a particular argumentative move sometimes made by British judges (both in England and Scotland) and, accordingly, my account of IBE-P is presented by reference to prominent Scottish and English cases. But British judges do not have exclusivity in deploying IBE-Ps. Not only it is used by judges operating within other jurisdictions (both civil and common law), they are also deployed (*mutatis mutantis*) by doctrinal scholars trying to make sense of legal authoritative materials across many jurisdictions. Regrettably, a demonstration of how IBE-Ps are deployed in those contexts cannot be accomplished here.

to run, the ways in which its *explanandum* is construed, and some criteria for choosing the best among a number of candidate explanations.